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PROPER USE OF THE WRIT OF INJUNCTION—FROM THE STANDPOINT OF LEGAL HISTORY.

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According to the theory of the English Constitution the King is the fountain of justice and general conservator of the peace of the Kingdom. In the early days of the Norman Conquest he actually sat at the time in the *Aula Regis*. This cumbrous and peripatetic court soon became unequal to the administration of justice and out of it were evolved the Common Pleas, the Exchequer and the King's Bench. It seems somewhat surprising that this latter Court, the residuum, so to speak, of the *Aula Regis*, should not have taken upon itself the duty of administering justice in all its phases and should not have assumed the equity jurisdiction possessed and sometimes exercised by that venerable tribunal. To the narrow-mindedness of the judges and their lack of power of initiative is, no doubt, attributable the fact that it did not. It could only take cognizance of a suit after there had issued out of the Chancery an original writ in the King's name, framed according to a prescribed form. This constituted the commission in accordance with which it proceeded to determine the matter. The jurisdiction thus assumed by or conferred upon the King's Bench being so limited, there was left a large residuum of wrongs unredressed. Petitions were being constantly preferred to the King as the fountain of justice, or to his select council, in respect of matters unprovided for. These petitions were often referred for decision to the Chancellor, who had become an officer of great consideration, and who being an ecclesiastic, versed in the civil law, was regarded as the best person to dispose of them. The references were at first special, but

Edward III by a writ or ordinance referred all such matter as were of grace to be despatched by the Chancellor or by the Keeper of the Privy Seal. The establishment of the Court of Chancery as a Court of Equity is generally considered, says Spence, to have been mainly attributable to this or some similar ordinance.[1]

The matters regarded as of grace were, in the first place, those that appealed to the equity and conscience of the Chancellor, such as matters of fraud, trust, mistake, &c.—matters of which the prætor had taken cognizance many centuries before. His jurisdiction in this class of cases seems never to have been seriously disputed by the common law judges. The precedents show that they often sanctioned and approved the relief he gave. But he went further. The disorders of the times were such that the weak were powerless to secure justice through the ordinary channels, and the Chancellor was appealed to for relief in cases of violence and outrage. With the good will and assistance of an enterprising monarch desirous of curbing the turbulent nobility, he was no doubt able, in some instances, to deserve the panegyric composed in favor of the Bishop of Ely, Chancellor to Richard I:—

Si quid obest populo, vel moribus est inimicum,
Quicquid id est, per cum desinit esse nocens.

The jurisdiction which he assumed in these matters was, in a measure, criminal and it ceased in the time of Elizabeth, when the ordinary tribunals had become able to render equal justice to all. The Chancellor also undertook to restrain and otherwise interfere with the proceedings of the law courts. This part of the jurisdiction, though necessary, if justice was to be done, was always resisted by the common law judges and culminated in the famous controversy between Lord Coke and Lord Ellesmere, which was resolved in favor of the latter. The precise point there settled was

"that the Chancellor had the jurisdiction which he had exercised to examine the judgments of the Courts of Common law and to stay execution, if he should find that they had been obtained by fraud for which the Courts of Common Law could not afford sufficient remedy."

1. Spence, Eq. Juris. of Ct. Chan., Vol. I, p. 338.

Where equity and law are administered by separate tribunals this jurisdiction has, to a certain extent, continued to the present day. The jurisdiction to restrain crime has been long since disclaimed. So complete is the refusal of the English equity judges to interfere in matters criminal that in *Prudential Assurance Co.* v. *Knott*[2] it was held that the Court had no jurisdiction to restrain the publication of a libel, even if injurious to property.[3] It is by no means true, however, that if the act sought to be enjoined is or may be criminal, Equity will withhold its aid. This is decided in *In re Debs*.[4] There, interstate commerce and the carrying of the mails were obstructed and the property employed therein was threatened with destruction by the lawless acts of strikers. It was a case of irreparable injury, not merely to individuals and corporations but also to the United States, which had a special property in the mails while under their care. Mr. Justice Brewer said:[5]

"Again it is objected that it is outside of the jurisdiction of a court of equity to enjoin the commission of crimes. This as a general proposition is unquestioned. A Chancellor has no criminal jurisdiction. Something more than the threatened commission of an offense is necessary to call into exercise the injunctive powers of the court. There must be some interferences, actual or threatened, with property or rights of a pecuniary nature, but when such interferences appear, the jurisdiction of a court of equity arises and is not destroyed by the fact that they are accompanied by, or are themselves violations of the criminal law."

The distinction is manifestly between a mandate not to inflict irreparable injury to property, or property rights, and a mandate not to commit criminal acts done in the course of inflicting such injury. The distinction is not one peculiar to the Debs case. It runs through the whole range of equity proceedings. A partner

2. (1874) L. R. 10 Ch. App. Cas. 142.

3. In view of the language of the Judicature Act of 1873, which gives in the broadest terms the right to restrain the committal of any wrongful act (see Jessel's comment in Beddow *v.* Beddow (1878) L. R. 9 Ch. Div. 89, at 92), it might be open to question, at least, whether a case containing similar facts would be decided in the same way now. Thorley's Cattle Food Co. *v.* Massam (1880) L. R. 14 Ch. Div. 763; Thomas *v.* Williams (1880) L. R. 14 Ch. Div. 864.

4. (1894) 158 U. S. 564.

5. At p. 593.

is, by mandatory injunction, required to deliver over the property and books of the firm to a receiver. Instead of that he destroys them. A trustee is directed to pay money into court. Instead of doing so, he embezzles it. The jurisdiction of the Court to issue its injunction would certainly not be taken away by an allegation in the bill that these acts are threatened.

The right to issue writs of injunction is co-extensive with the right to give relief in matters of equitable cognizance. Equity acts only *in personam,* except in so far as some statute may have given other effect to its decrees. Its injunction, preventive or mandatory, is one of its means, if not its chief means of enforcing them. It is, in fact, a species of execution. The origin of the writ is not far to seek. From the thirteenth century down, the study of the civil law was vigorously prosecuted by the clergy and in it the Chancellor, almost always an ecclesiastic, found a body of principles adapted to guide him in his effort to supplement the defects and soften the rigor of the common law as then expounded. Among other things he found the *Interdict,* which is thus defined in the Institutes:

*"Erant autem Interdicta formæ atque conceptiones verborum, quibus prætor aut iugebat aliquid fieri aut fieri prohibebat. * * * Prohibitoria sunt, quibus vetat aliquid fieri; veluti vim sine vitio possidenti, vel mortuum inferenti, quo ei ius erat inferendi, vel in loco sacro ædificari, vel in flumine publico ripave eius aliquid fieri, quo peius navigetur. Restitutoria sunt, quibus restituti aliquid iubet."*[6]

This is the very definition of an injunction to be found in our own books:

"A judicial process whereby a party is required to do a particular thing or to refrain from doing a particular thing according to the exigency of the writ."

When it issues after final hearing to enforce the decree, it is as I have said, obviously, in the nature of an execution. As Eden says, in the endless variety of cases cognizable in equity, if the relief to which the plaintiff is entitled consists in restraining the commission or the continuance of some act, equity administers it by means of this writ.

6. Inst. Lib. 4. tit. 15.

But the writ is more than a writ of execution. It may issue at the beginning or during the progress of a cause. Its function then is to maintain the *status quo* or to preserve the subject-matter of the litigation until the controversy is finally decided. It will occasionally issue where the controversy is legal and not equitable. Prevention is better than cure. A remedy that prevents injury to one's property rights is better than one which awards damages for their violation. Theoretically, every one will concede this, but practically, difficulties have arisen, which have called forth pretty strong statements by eminent judges. Thus, Judge Baldwin in *Bonaparte* v. *C. & A. R. R. Co.*[7] says:

"There is no power, the exercise of which is more delicate, which requires greater caution, deliberation and sound discretion, or is more dangerous in a doubtful case, than the issuing an injunction."

And Lord Cottenham, in *Brown* v. *Newall*,[8] says:

"I have always felt, and since I have been upon the bench, I have seen no reason to alter my opinion, that extreme danger attends the exercise of this part of the jurisdiction of the court, and that it is a jurisdiction to be exercised with extreme caution."

The reason is evident: In these interlocutory applications, the Court is generally obliged to act on *ex parte* affidavits, that, if they do not positively mistake the facts, often give a very inadequate view of them. So impressed have been the English equity judges with the necessity of discouraging one-sided statement that they hold that if the *ex parte* presentation of the case has not been fair, they will dismiss the application without regard to its merits. Says Wigram, *V. C.*, in *Castelli* v. *Cook*:[9]

"The rule, as I understand it, is this: A plaintiff applying *ex parte* comes (as it has been expressed) under a contract with the Court that he will state the whole case fully and fairly to the Court. If he fails to do that and the Court finds when the other party applies to dismiss the injunction that any material fact has been suppressed or not properly brought forward, the plaintiff is

7. (1830) 1 Bald. Cir. R. 205, at 217.

8. (1837) 2 M. & C. 558, at 570.

9. (1849) 7 Ha. 89, at 94.

told the Court will not decide on the merits and that as he has broken faith with the Court, the injunction must go" (*i. e.*, be dissolved).

The duty imposed upon the judge to whom the application is made is one that involves care and caution. He must protect and preserve the alleged right of the plaintiff, but he must also guard the right of the defendant as well. A temporary injunction may answer the purposes of an unscrupulous applicant as well as a perpetual one.

Much the best means of protecting a defendant is to give him notice, even if it be only a few hours' notice—unless the giving of it would be likely to defeat the purpose of the application: that is, might itself precipitate the impairment or destruction of the right which the plaintiff is seeking to have protected. Thus, if defendant threatens to cut down my ornamental shade tree or to put an imitation of my label upon his goods, or to pirate my manuscript, it is evident that an unscrupulous suitor may, if he have notice, hasten to act before he is stopped by the service of the writ. In cases like these, any system of jurisprudence that did not provide some means of preventing an injury, would be very defective.

In cases of this sort therefore the Court must protect the defendant in some other way. It does so (1) by not going beyond the exigencies of the then situation, even if it be probable that on final hearing a larger measure of relief will be accorded; (2) by imposing terms. So flexible is equity procedure that these terms can always be made to fit the particular case. An undertaking or bond may be exacted with or without sureties. The judge may require an account to be kept, or money to be paid into court. On the other hand, if the Court feels that by imposing terms on the *defendant* the plaintiff will be secured, in the event of the suit's being determined in his favor, and the defendant is willing to accede to these terms, an injunction will not issue. The defendant may, moreover, be required to do such acts or execute or remove such works, or enter into such undertaking as the Court may direct.[10]

Another safeguard is the requisition of a special affidavit containing a statement of the material facts, verified by the oath of

10. Keer, Injunctions (3rd Ed.) 27.

some person who has personal knowledge of them.[11] The cases in which the plaintiff is allowed to verify his bill by swearing as to his belief are few, and those occur only where in the nature of things positive proof cannot be expected.

Again, the Court will not grant an injunction on the theory that it will do the defendant no harm, if he has not done, or does not intend to do the act complained of; nor where there is unexpected delay, nor where the conduct of the plaintiff is not fair, *i. e.*, not free from all taint of fraud or illegality.

The defendant's right being carefully and properly safeguarded in one or more of the ways above mentioned, it would be difficult to assert that the injunction *pendente lite* is not a necessity in any modern system.

To sum up: Unless statutes have prescribed otherwise, injunctions issue only where the controversy concerns property, or property rights, including, of course, contract rights; and not always then. For some property and some property rights receive in the courts of law what is deemed adequate protection. Where such protection is afforded, equity does not interfere, except in the few instances where it is necessary to preserve the *status quo,* and the court in which the legal contest is pending, for some reason, cannot give the needed protection.

Where the assistance of equity is invoked there may indeed be a question whether the subject-matter of the controversy is a property right or a contract right requiring equitable protection. Thus, there may be a question whether a man has a property right in his own features. If it be held he has not the Court will not enjoin.[12] If it be held that he has[13] then the Court will. But this and similar questions are not really questions of injunction but of substantive right. If the right be established, the injunction goes as a matter of course and upon the principle upon which it issues in other cases.

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11. Youngblood *v.* Schamp (N. J. 1862) 2 McCarter 42.

12. Roberson *v.* Rochester Folding Box Co. (1902) 171 N. Y. 538.

13. Edison *v.* Edison Polyform Man. Co. (N. J. 1907) 67 Atl. 392.